

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
PUBLIC COPY

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



82

Date: JUL 05 2012 Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be engaged in semiconductor research and development and manufacturing, and it seeks to employ the beneficiary as an industrial engineer pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The 2010 fiscal-year cap for the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), was reached on December 21, 2009. Although the Form I-129 petition for new employment was received on March 30, 2010 after the H-1B cap had been reached, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 that the beneficiary was exempt from the fiscal year cap based on her previously being granted status as an H-1B nonimmigrant in the past six years and not having left the United States for more than one year after attaining such status.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary is exempt from the annual permitted numerical limitations for H-1B nonimmigrants at section 214(g)(1)(A) of the Act. Specifically, the director noted that the beneficiary was previously granted H-1B1 Free Trade status and was now seeking to change her status to H-1B nonimmigrant classification. Noting that she had not previously been counted toward the H-1B cap, the director denied the petition.

On appeal, counsel asserts that the beneficiary was previously admitted to the United States as a Singaporean H-1B1 Free Trade specialty worker. Counsel asserts that the Singapore H-1B1 Free Trade visa is a subset of the H-1B quota, and contends that since the beneficiary was already counted toward the H-1B cap under the subset at section 214(g)(8)(B)(iv) of the Act, 8 U.S.C. § 1184(g)(8)(B)(iv), she was therefore exempt from the cap.

Upon review of the record of proceeding, the AAO concurs with the director's conclusions. The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, and supporting documentation.

Section 214(c) of the Act, 8 U.S.C. § 1184(c), provides, in relevant part (emphasis added):

The question of importing any alien as a nonimmigrant under subparagraph (H), (L), (O), or (P)(i) of section 101(a)(15) (*excluding nonimmigrants under section 101(a)(15)(H)(i)(b1)*), in any specific case or specific cases shall be determined by

the [Secretary of Homeland Security], after consultation of appropriate agencies of the Government, upon petition of the importing employer.

Section 214(g)(1) of the Act, 8 U.S.C. § 1184(g)(1), provides in relevant part:

The total number of aliens who may be issued visas or otherwise provided *nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-*

(A) under section 101(a)(15)(H)(i)(b), may not exceed--

- (i) 65,000 in each fiscal year before fiscal year 1999;
- (ii) 115,000 in fiscal year 1999;
- (iii) 115,000 in fiscal year 2000;
- (iv) 195,000 in fiscal year 2001;
- (v) 195,000 in fiscal year 2002;
- (vi) 195,000 in fiscal year 2003; and
- (vii) 65,000 in each succeeding fiscal year[.]

Section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), provides in relevant part (emphasis added):

Any alien who has already been counted, *within the six years prior to the approval of a petition described in subsection (c)*, toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed.

Section 214(g)(8) of the Act, 8 U.S.C. § 1184(g)(8), provides in relevant part:

(A) The agreements referred to in section 101(a)(15)(H)(i)(b1) are-

- (i) the United States-Chile Free Trade Agreement; and
- (ii) the United States-Singapore Free Trade Agreement.

(B)(i) The Secretary of Homeland Security shall establish annual numerical limitations on approvals of initial applications by aliens for admission under section 101(a)(15)(H)(i)(b1).

(ii) The annual numerical limitations described in clause (i) shall not exceed-

(I) 1,400 for nationals of Chile (as defined in article 14.9 of the United States-Chile Free Trade Agreement) for any fiscal year; and

(II) 5,400 for nationals of Singapore (as defined in Annex 1A of the United States-Singapore Free Trade Agreement) for any fiscal year.

(iii) The annual numerical limitations described in clause (i) shall only apply to principal aliens and not to the spouses or children of such aliens.

(iv) The annual numerical limitation described in paragraph (1)(A) is reduced by the amount of the annual numerical limitations established under clause (i). However, if a numerical limitation established under clause (i) has not been exhausted at the end of a given fiscal year, the Secretary of Homeland Security shall adjust upwards the numerical limitation in paragraph (1)(A) for that fiscal year by the amount remaining in the numerical limitation under clause (i). Visas under section 101(a)(15)(H)(i)(b) may be issued pursuant to such adjustment within the first 45 days of the next fiscal year to aliens who had applied for such visas during the fiscal year for which the adjustment was made.

(C) The period of authorized admission as a nonimmigrant under section 101(a)(15)(H)(i)(b1) shall be 1 year, and may be extended, but only in 1-year increments. After every second extension, the next following extension shall not be granted unless the Secretary of Labor had determined and certified to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 212(t)(1) for the purpose of permitting the nonimmigrant to obtain such extension.

(D) The numerical limitation described in paragraph (1)(A) for a fiscal year shall be reduced by one for each alien granted an extension under subparagraph (C) during such year who has obtained 5 or more consecutive prior extensions.

The AAO generally agrees with counsel's assertion that an alien, who previously held H-1B status within the six years prior to the approval of the petition but did not exhaust his or her entire period of admission, would be exempt from the H-1B cap if it can be demonstrated that he or she was previously counted toward the limitations and that he or she is not again eligible for a full six years of authorized admission at the time the petition is filed. The threshold issue in this matter, however,

which counsel overlooks, is that the beneficiary did not hold H-1B status within the last six years as required by the Act to be considered already counted towards the H-1B numerical limitations.

The record indicates that the beneficiary was granted H-1B1 Free Trade status from November 17, 2008 through May 16, 2010. The regulation at section 214(g)(7) provides that an alien who has been counted toward the cap within the six years prior to the approval of a petition described in subsection (c), shall not again be counted toward the numerical limitations under section 214(1)(A). Subsection (c) of section 214 refers to petitions filed under sections (H), (L), (O), or (P)(i) of the Act, and specifically excludes (H)(i)(b1) petitions. The beneficiary did not hold H-1B status within the last six years, and was thus not counted toward the H-1B cap.

Unlike H-1B nonimmigrant workers, whose period of authorized admission may not generally exceed six years, H-1B1 nonimmigrant professionals are admitted for a one-year period which is renewable indefinitely, provided the alien is able to demonstrate that he/she does not intend to remain or work permanently in the U.S. Initial applications for H-1B1 classification, as well as the sixth and all subsequent extensions of stay, are counted against the H-1B1 annual numerical limitations, which in turn has the effect of reducing the number of available H-1B visas in a given fiscal year. This fundamental difference between H-1B and H-1B1 nonimmigrant workers is further defined by the creation of a separate and distinct cap for Chilean and Singaporean nationals under section 214(g)(8) of the Act. Thus, despite its relevance to and relationship with the annual H-1B numerical limitations, the annual numerical limitations for nationals of these countries is separate and distinct from that of the H-1B cap and, therefore, cannot be deemed reciprocal when seeking to change status from H-1B1 to H-1B.

Consequently, the AAO finds that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap under the requirements of section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), because the beneficiary was not in H-1B status and counted toward the H-1B cap within the six years prior to the filing of the instant petition, as required by that section of the Act. Although the beneficiary was granted H-1B1 status under the United States-Singapore Free Trade Agreement and counted toward the numerical limitation of 5,400 for Singaporean nationals, she was not afforded H-1B status during this period and thus is not cap exempt as asserted by counsel. Accordingly, the AAO will not disturb the director's denial of the petition

The appeal will be dismissed and the petition will be denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition is denied.